UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

VIET ANH VO,
Plaintiff,

V. **Civil Action No. 16-cv-15639-ILRL-MBN**

REBEKAH E. GEE, Secretary of the Department of Health; DEVIN GEORGE, State Registrar; MICHAEL THIBODEAUX, Iberia Parish Clerk; DIANE MEAUX BROUSSARD, Vermilion Parish Clerk; LOUIS J. PERRET, Lafayette Parish Clerk,
Defendants.

BRIEF OF AMICI CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS, GLBTQ LEGAL ADVOCATES & DEFENDERS, AND LAMBDA LEGAL IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Amici curiae are legal organizations dedicated to securing equality for lesbian, gay, bisexual, and transgender people. As such, amici served as counsel in a number of state and federal cases challenging state laws barring same-sex couples from marriage, including *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Amici offer this brief for two purposes: first, to explain why the Supreme Court's holding in *Obergefell* unequivocally confirms that Mr. Vo and other foreign-born persons living in the United States have the same fundamental right to marry as persons born here; and second, to explain why the constitutional and other harms suffered by Mr. Vo as a result of Louisiana's bar on his freedom to marry are serious and irreparable and warrant the entry of a preliminary injunction in this case.

ARGUMENT

I. Foreign-Born Persons, Including Mr. Vo, Have the Same Fundamental Freedom to Marry as Others

Under settled constitutional law, the fundamental freedom to marry belongs to all persons, regardless of their national origin. In *Obergefell*, the Supreme Court provided the Court's most extensive discussion of the fundamental right to marry, including a detailed examination of the four central reasons marriage is protected as a fundamental right. For each of those reasons, the Court considered whether recognizing that same-sex couples have the same right to marry as others would be consistent with the reasons marriage is protected; in each case, the Court concluded that each of those reasons is just as applicable and important for same-sex couples as for others. As a result, the Court held that a person's sexual orientation is not relevant to his or her ability to participate in, or benefit from, the legal institution of marriage. The same is true of a person's national origin, which has no bearing whatsoever on a person's ability to form "committed relationships [that satisfy] the basic reasons why marriage is a civil right." *Id*. at 2600. Each of the reasons the Court held that same-sex couples have the same fundamental freedom to marry as others applies equally to Mr. Vo and other foreign-born persons who now reside in this country.

In *Obergefell*, the Supreme Court held that the right to marry is fundamental, first, because it involves decisions that lie at the heart of personal dignity and autonomy, including the freedom to choose whether and whom to marry without undue interference from the state. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation." *Id*. at 2599. This is also true for all persons, whatever their national origin. Just as "the freedom to marry, or not marry, a person of another race [or sex] resides with the individual and cannot be infringed by the State," *id.* (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)), the

freedom to marry, or not marry, a person of another national origin also resides with the individual and cannot be infringed by the State.

Second, the Court in *Obergefell* held that "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals." *Id.* In support of this principle, the Court cited its decision in *Turner v. Safley*, 482 U.S. 78 (1987), which upheld prisoners' fundamental freedom to marry. The Court held that, like the prisoners in *Turner*, whose "committed relationships satisfied the basic reasons why marriage is a fundamental right," same-sex couples have the same capacity for commitment and the same need for "companionship and understanding" as others who are permitted to marry. *Obergefell*, 135 S. Ct. at 2600. Plainly, the same is true of foreign-born persons such as Mr. Vo, who are no less capable of forming committed relationships than others, and who have the same need for "companionship and understanding." *Id.* The bond between Mr. Vo and his intended spouse is just as real, committed, and deserving of the legal protection afforded by marriage as the committed relationships of persons who are born in this country. Mr. Vo and Ms. Pham spent months carefully planning their wedding as a public affirmation of their commitment to one another, only to discover just two weeks before the ceremony that Louisiana would not issue them a marriage license. As a sign of their devotion to one another, they entered into a sacramental marriage in their Catholic Church, but they are devastated by the fact that their marriage is not legally recognized. Just as a person's race or sexual orientation is irrelevant to their ability to form a lasting family bond, the same is true of a person's national origin.

In *Obergefell*, the Court held that "[a] third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." *Id.* at 2600. The Court noted that marriage benefits children in many

different ways. State laws confer a number of specific benefits and protections for marital children. In addition, by "giving recognition and legal structure to their parents' relationship," marriage "allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.'" *Id.* (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2694-25 (2013)). And finally, "marriage also affords the permanency and stability important to children's best interests." *Id.* The Court concluded that, because many same-sex couples are raising children, "[e]xcluding [them] from marriage thus conflicts with a central premise of the right to marry." *Id.* "Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples." *Id.* at 2600-01.

The same analysis applies to Act 436 and its harmful and stigmatizing impact on the children of foreign-born persons. The inability of affected couples to legally marry under Louisiana law—and thereby ensure that any children they may have enjoy the protections of having married parents—"conflicts with a central premise of the right to marry." *Id.* at 2600. Exactly as the Court held of children raised by same-sex couples in *Obergefell*, Act 436 deprives children whose parent or parents were born outside of the United States of the many benefits provided to marital children under Louisiana law. *See, e.g.*, La. Civ. Code Ann. art. 185 (presumption of paternity of husband for children born during marriage); La. Civ. Code Ann. art. 195 (presumption of paternity by marriage and acknowledgment subsequent to birth); La. Civ. Code Ann. art. 221 (establishing parental authority over minor children for married parents). The inability to have married parents also deprives these children of many federal benefits that are

dependent on marriage. *See, e.g., Windsor*, 133 S. Ct. at 2694-95 (discussing various federal benefits dependent on marital status). Act 436 also deprives those children of the stability and recognition of having married parents and, like the children of same-sex couples in *Obergefell*, burdens those children with the stigma and humiliation of "knowing their families are somehow lesser." *Obergefell,* 135 S. Ct. at 2600.

Finally, the Court held that marriage is protected as a fundamental right because "marriage is a keystone of our social order." *Id.* at 2601. States have helped to bolster the social and legal importance of marriage by "ma[king] marriage the basis for an expanding list of governmental rights, benefits, and responsibilities." *Id.* (listing as examples: "taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules"). Being legally married under state law "is also a significant status for over a thousand provisions of federal law." *Id.*

As the Court noted, "[t]he States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order. . . [and] [t]here is no difference between same- and opposite-sex couples with respect to this principle." *Id.* The Court recognized that, regardless of sexual orientation, couples can access those state and federal protections only through marriage, and the impact of being excluded from them is equally devastating for same-sex couples as it would be for opposite-sex couples. Indeed, because marriage is the gateway to so many legal protections and has become such an important legal and social institution, the Court held that excluding a group of people from the ability to marry has profound consequences. "[B]y virtue of their exclusion from that institution, same-sex

couples are denied the constellation of benefits that the States have linked to marriage." *Id.* In addition, the Court noted:

> This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.

Id. at 2601-02.

This analysis applies equally to Louisiana's exclusion of Mr. Vo and other foreign-born persons from the ability to marry. Like other states, Louisiana affords married couples a vast array of state law protections, most of which cannot be replicated by other means.[1] Being unable to legally marry also deprives Mr. Vo and his intended spouse of the many federal protections given only to persons who are legally married under state law. As the Supreme Court held in *Obergefell*, the negative impact of that exclusion is profound, creating an "instability" that persons born in this country would not tolerate for themselves. *Id.* at 2601. In addition, because marriage is such a central social and legal institution, "exclusion from that status has the effect of teaching that [foreign-born persons] are unequal in important respects. It demeans [foreign-born persons] for the State to lock them out of a central institution of the Nation's society." *Id.* at 2602. There is no rational basis, much less a compelling one, for limiting marriage based upon a person's national

[1] *See, e.g.*, La. Civ. Code Ann. arts. 2315, 2315.1, 2315.2, 2315.5, 2315.6 (spousal rights to claim losses in damages actions); La. Civ. Code Ann. art. 2315.2 (action for wrongful death); La. Civ. Code Ann. art. 2338 (community property); La. Civ. Code Ann. art. 889 (spousal right to inherit community property); La. Civ. Code Ann. art. 890, 894 (spousal right to inherit); La. Civ. Code Ann. art. 111 (spousal right to seek support); La. Rev. Stat. Ann. § 40:1159.4(A)(4) (spousal right to consent to medical care); La. Code Evid. Ann. arts. 504, 505 (spousal testimonial privileges).

origin.[2]

In sum, because limiting the right to marry only to persons born in the United States conflicts so profoundly "with the central meaning of the fundamental right to marry," "laws excluding [foreign-born persons] from the marriage right impose stigma and injury of the kind prohibited by our basic charter." *Id.*

II. Denying Mr. Vo's Freedom To Marry Because Of His National Origin Will Cause Him Irreparable Harm

Mr. Vo is irreparably harmed each day that Act 436 deprives him of his constitutionally protected freedom to marry. As explained in Mr. Vo's brief and as amici further explain above with respect to the fundamental right to marry, Act 436 violates the equal protection and due process requirements of the federal Constitution. These constitutional harms are themselves sufficient to establish irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.")).

In addition to the irreparable harm of being denied these constitutional rights, Mr. Vo is also suffering severe dignitary and practical harms that, if allowed to continue, cannot be redressed by money damages or even a subsequent court order. As the Supreme Court recognized in *Obergefell* and prior cases dealing with the right to marry, marriage plays a unique and central social, legal, and economic role in American society. Being married reflects the commitment that

[2] For the reasons set forth in Mr. Vo's brief, amici agree that Act 436 also violates his constitutional rights by denying him equal protection of the laws based upon his national origin, a classification that warrants strict scrutiny under established Supreme Court precedent. *See* Dkt. 34-1 at 11-12.

a couple makes to one another, as well as representing a public acknowledgement of the value, legitimacy, depth, and permanence of the married couple's relationship. Conversely, denial to some couples of the status of being married in the eyes of the state conveys the state's view that the couple's private relationship is of lesser value and unworthy of legal recognition and support. This public rejection of Mr. Vo's most significant relationship damages him and his intended spouse, as well as any children they may have, and promotes the view that their relationships and families are inferior to those of other committed couples. In *Windsor*, the Court echoed principles set forth in *Loving v. Virginia* forty-six years earlier, finding that the denial of the legal recognition to a couple's marriage "demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)). The same is true here.

Mr. Vo and his intended spouse are also denied the array of state law protections intended to safeguard married couples and their families. For example, he and Ms. Pham do not have community property rights, and they are denied the protections afforded married couples upon the death of a spouse, such as intestacy rights permitting the surviving spouse to benefit from the deceased's estate. *See* La. Civ. Code Ann. art. 889, 890, 894, 2338. They also are denied the automatic right to make health care decisions for one another, including emergency decisions regarding whether to withdraw life-sustaining medical care. *See* La. Rev. Stat. Ann. § 40:1159.4(A)(4).

Being unable to marry also deprives Mr. Vo and his intended spouse of countless federal protections that are reserved exclusively for persons who are validly married under state law. Some of the more important of these include the right to file joint federal income tax returns; 26 U.S.C.A. § 6013; the right to exclude the value of employer-provided spousal health insurance

coverage from one's gross income for federal income tax purposes; 26 U.S.C. §§ 105, 106(a), 26 C.F.R. § 1.106-1; the right to receive Social Security survivor benefits; 42 U.S.C. §§ 402, 415; the right of the lower-earning spouse to base his or her Social Security retirement benefit on the earnings history of the higher-earning spouse and to continue receiving a higher-earning spouse's retirement benefit upon that spouse's death; 42 U.S.C. § 402, 20 C.F.R. § 404.335; and the right to unpaid leave from employment to care for a spouse under the Family Medical Leave Act; 5 U.S.C. § 6382(a), 29 U.S.C. § 2612(a).

In addition, barring foreign-born individuals from the legal shelter of marriage encourages and facilitates both private and official discrimination, because it "instructs all [state and] federal officials, and indeed all persons with whom [these] couples interact, including their own children, that their [relationship] is less worthy than the marriages of others." *Windsor,* 133 S. Ct. at 2696. As was also true for same-sex couples, the negative impact of that exclusion on foreign-born persons is exacerbated by a long and continuing history of discrimination and negative stereotypes that portray immigrants to this country in a falsely negative light. Since at least the mid-nineteenth century and continuing to the present, states and localities have enacted a vast number of discriminatory laws that target immigrants and reflect false and invidious societal perceptions of them as untrustworthy persons or even criminals. *See e.g.*, Mooney, *The Search for A Legal Presumption of Employment Duration or Custom of Arbitrary Dismissal in California 1848-1872*, 21 Berkeley J. Emp. & Lab. L. 633, 650 (2000) (describing California's use of anti-vagrancy laws and other legislation in the 1850s to target Spanish-speaking residents); Cummings & Boutcher, *Mobilizing Local Government Law for Low-Wage Workers*, 1 U. Chi. Legal F. 187, 213 (2009) (describing enactment of local loitering laws in response to fears about day laborers and other immigrants occupying public spaces); *Plyler v. Doe*, 457 U.S. 202, 205 (1982) (invalidating Texas

statute that permitted public school districts to deny enrollment to undocumented immigrant children); *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997) (invalidating most provisions of California ballot initiative that prohibited the state from delivering health, education, and social services to undocumented immigrants); Ed Falco, When Italian Immigrants Were 'The Other,'" CNN, July 10, 2012 (describing 1891 lynching in New Orleans of eleven Italian immigrants). "Especially against a long history of disapproval . . . denial to [immigrants] of the right to marry works a grave and continuing harm." *Obergefell*, 135 S. Ct. at 2604.

Here, it is not tenable for Mr. Vo and other similarly situated persons to wait for a potentially lengthy litigation and appellate process to obtain the critical security and protection to which they and their families are entitled under law. Louisiana's refusal to permit Mr. Vo to legally marry his intended spouse means that they are unable to assume full responsibility for one another and have no meaningful protection against being treated as legal strangers by third parties and the state. That refusal also means that Mr. Vo and Ms. Pham are barred from receiving the many critical state and federal protections afforded only to legally married persons. And just as important, that refusal subjects Mr. Vo and Ms. Pham to constitutionally intolerable stigma and humiliation, sending the message that he and other foreign-born persons are somehow unfit to participate in the institution of marriage, that their relationships and families are unworthy of being treated the same as others, and that it is permissible to treat him as inferior solely because he was born outside of the United States.

The public interest also strongly supports the entry of a preliminary injunction. As the Supreme Court recognized in *Obergefell*, marriage is an important keystone of our social order and promotes many compelling public interests, including the stability and autonomy of families.

A law that erects arbitrary and discriminatory barriers to marriage is harmful not only to the individuals directly affected, but to the entire society. In sum, the Constitution forbids laws that burden or deny the exercise of a fundamental right and that facially discriminate based on national origin, as Act 436 does, and the immediate and irreparable harm that Act inflicts on Mr. Vo, his intended spouse, similarly situated persons, and the public at large warrants preliminary relief enjoining its enforcement.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the Court grant Plaintiff's Motion for Preliminary Injunction.

Respectfully submitted this February 8, 2017.

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